Nos. 78-167, 78-168 and 78-169

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN AIR FILTER COMPANY, INC., ET AL., PETITIONERS
v.
FEDERAL TRADE COMMISSION, ET AL.

THE GOODYEAR TIRE & RUBBER COMPANY, ET AL., PETITIONERS
v.
FEDERAL TRADE COMMISSION, ET AL.

DEERING-MILLIKEN, INC., PETITIONER
v.
FEDERAL TRADE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-53) is not yet reported. The opinions of the district court (Pet. App. 54-78, 80-118, 121-148) are reported in part at 432 F. Supp. 274 and 291.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1978. The petitions for a writ of certiorari were filed on July 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission must follow rulemaking procedures before issuing individual orders requiring certain corporations to file reports containing information about their operations.

2. Whether the Census Act prohibits the FTC from asking a question essentially identical to a question in a Census report.

3. Whether the information sought by the FTC's Line of Business report is reasonably relevant to the Commission's purpose and the burden of compliance is not undue.

4. Whether the Federal Reports Act required the Comptroller General to inquire broadly into the degree of probable utility or reliability of the data sought by the Commission's Line of Business report.

5. Whether the FTC used proper procedures in seeking judicial enforcement of the requests for information.

6. Whether petitioner Deering-Milliken has exhausted its administrative remedies concerning its argument that the FTC cannot use or disclose information provided in that company's reports.

STATUTES INVOLVED

Most of the pertinent statutes are set out in the petitions. We reproduce here two relevant sections omitted from the petitions.

Part of the Federal Reports Act of 1942, 44 U.S.C. (Supp. V) 3512(c), which is omitted from the reproduction of Section 3512 at Goodyear Pet. Add. 4a, provides:

> (c) In complying with this section, an independent regulatory agency shall not conduct or sponsor the collection of information upon an identical item from ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms to be used in the collection—
>
> (1) the agency submitted to the Comptroller General the plans or forms, together with the copies of pertinent regulations and of other related materials as the Comptroller General has specified; and
>
> (2) the Comptroller General has advised that the information is not presently available to the independent agency from another source within the Federal Government and has determined that the proposed plans or forms are consistent with the provision of this section. The Comptroller General shall maintain facilities for carrying out the purposes of this section and shall render such advice to the requestive independent regulatory agency within forty-five days.

Part of the Census Act, 13 U.S.C. 132, provides:

> To the extent that the provisions of this subchapter or subchapter IV of this chapter conflict with any other provision of this title or other law, pertaining to the Secretary or the Department of Commerce, the provisions of this title shall control; but nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

STATEMENT

This case involves two sets of orders issued by the Federal Trade Commission pursuant to 15 U.S.C. 46(b), requiring petitioners and many other large corporations to file special reports in its Line of Business and Corporate Patterns surveys. Although these information-gathering surveys are independent, petitioners raised many common legal objections, and the litigation concerning both sets of orders proceeded in tandem.

A. THE LINE OF BUSINESS PROGRAM

The 1974 Line of Business Report is the first full-scale survey in the FTC's Line of Business ("LB") program. The Commission is endeavoring through the LB program to collect financial performance information (*e.g.*, sales, costs, profits) on a uniform basis from nearly 500 of the country's largest manufacturers with respect to some 260 industry categories (Pet. App. 9). The Commission plans to publish reports showing the aggregate results for each category. The Commission will not make public any company's LB report or use individual company data for law enforcement purposes, and it will not publish aggregate data if the Commission believes they will disclose individual company data.

The Commission expects that the LB data will enable it to assess relationships between market structure and performance. It believes that this will improve the effectiveness of its antitrust enforcement activities. The information needed for such analysis is not readily available.

The Commission began developing a LB form in 1970 (LBA 2655, 2798).[1] During the next several years

[1] "LBA" refers to the court of appeals' appendix in the LB report cases.

proposed LB forms prepared by the Commission's staff were reviewed by the Office of Management and Budget, pursuant to the Federal Reports Act of 1942, 44 U.S.C. (1970 ed.) 3501 *et seq*. One version was the subject of comments at a public hearing held by OMB's Business Advisory Council on Federal Reports (which included several of the petitioners). Based in part on information in the more than four hundred comments received, and consultation with accountants, the Commission's staff revised the LB form considerably and in December 1973 solicited comments on the revised form. After extensive communications with persons interested in the LB proposal, the Commission's staff further revised the proposed LB form. In March 1974 the Commission approved use of a limited version of a form for 1973 and the full version of that form for 1974 (LBA 278, 348, 351, 352). The 1973 LB form differed significantly from the 1974 LB report here in issue, and it was never used for 1974.

After the Commission served orders on 345 companies to file the limited 1973 LB form, some 225 companies filed motions to quash, many of them supported by extensive factual submissions (LBA 490-492). Although the Commission denied most of these motions,[2] its experience with the 1973 form led it to make substantial changes in the 1974 form. In April 1975 the FTC published in the Federal Register a notice of the new proposed 1974 LB form and invited and received written comments on all aspects of the LB program (40 Fed. Reg. 17081 (1975); see, *e.g.*, LBA 2353-2403). The full Commission also held a day-long public hearing (Pet. App. 10-11).

[2] The Commission ultimately withdrew the 1973 orders concerning companies that had not voluntarily compiled. More than 200 companies filed 1973 forms (LBA 2589).

In response to the comments, the FTC made still further changes and approved the final 1974 LB form in July 1975. It then submitted the form to the Comptroller General for review under the 1973 amendments to the Federal Reports Act of 1942, 44 U.S.C. (Supp. V) 3512, stating that the Commission had reconsidered the issues (LBA 729). The General Accounting Office solicited comments on the form; after reviewing these comments (including many from petitioner) it informed the FTC that the 1974 form satisfies the criteria of the Federal Reports Act (Pet. App. 11, 48-49 & n.147; LBA 789-802).

The Commission served orders requiring petitioners and many other companies to complete the 1974 LB report. This created still another opportunity for review; some 180 companies took advantage of their right to ask the FTC to quash its own orders (Pet. App. 11-12). The Commission denied most of these motions, writing an opinion addressing the objections raised by the companies (LBA 878-896). Most of the companies initially served by the Commission have filed 1974 LB reports; others, including petitioners, have refused to do so.[3]

B. THE CORPORATE PATTERNS SURVEY

The Corporate Patterns Survey Report (CPR) requests information concerning corporate relationships and market structure. The FTC previously conducted such a survey covering the 1,000 largest domestic manufacturing corporations in 1950. The present survey covers what the Commission believes were the 1,000

[3]The FTC also has issued orders to 481 companies, including most of petitioners, requiring submission of LB forms for 1975 and 1976. In view of the status of the present litigation, the FTC has not yet sought judicial enforcement of the orders to complete the 1975 and 1976 reports. The Commission has stated that it will again invite comments before making major changes in the LB program.

largest companies in 1972 and others that were in the 1950 survey. Like the 1950 survey, the CPR form calls for, *inter alia*, "best estimates" of the reporting companies' value of shipments from domestic manufacturing establishments, using certain uniform definitions developed by the Census Bureau (Pet. App. 23 n. 61).

The Commission's primary purpose in conducting the CPR survey is to develop an internal data bank to facilitate expeditious analyses for law enforcement, economic studies, and policy planning (Pet. App. 12; see CPRA 256-261).[4] The Commission contemplates the possible publication of aggregate and individual company CPR data but has made no decision to do so. It has determined that it would not publish any individual company data unless the data were at least five years old (CPRA 303, 472), and it has indicated that it may grant further confidential treatment to data in a company's CPR report on a showing of need (Pet. App. 43; see CPRA 472, 477).

Work began on the present CPR survey in 1972 (Pet. App. 13; see CPRA 1048). The Commission conducted a pretest of a CPR form using a small number of companies (CPRA 267), and the Commission's staff conferred with the Census Bureau and other pertinent federal agencies (CPRA 265). After deleting some questions to reduce the burden of compliance (CPRA 268), the Commission approved the present CPR form in December 1974 and submitted it to the General Accounting Office for review (CPRA 256). GAO invited and received comments on the CPR form from the public (including many of the petitioners) and from its own consultants; it advised the

[4]"CPRA" refers to the court of appeals' appendix in the CPR cases.

Commission that the form is consistent with the Federal Reports Act (CPRA 777).

The Commission later served orders requiring some eleven hundred companies to file CPR reports within 90 days. Some 390 companies, including most of the petitioners, eventually filed motions to quash the Commission's orders. After modifying the CPR form in response to the motions, the Commission denied the motions, addressing each of the objections that had been raised (Pet. App. 13-14; CPRA 455-491). The great majority of the companies filed CPR reports (CPRA 811); most of the petitioners refused to file the reports.

C. THE LITIGATION

Many of the companies that elected not to comply with the FTC's orders filed suits against the Commission, arguing that its orders are invalid.[5] The Commission instituted proceedings seeking enforcement of its orders. The actions filed by the companies were transferred to the United States District Court for the District of Columbia and consolidated with the Commission's proceedings.

The district court first held (Pet. App. 55-57) that the FTC's enforcement proceedings were procedurally sufficient. It then granted the Commission's motion for summary judgment on most issues (*id.* at 80-120) and

[5]Many companies also sought judicial review of the 1973 LB orders. One district court denied preliminary relief. *Aluminum Co. of America* v. *FTC*, 390 F. Supp. 301 (S.D.N.Y. 1975). Another granted preliminary relief, but that decision was reversed on the ground that the companies had not shown irreparable injury. *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108, 1125 (D. Del. 1975), rev'd, 530 F. 2d 515 (3d Cir. 1976). This litigation became moot when the Commission withdrew the orders to file 1973 LB reports.

allowed the companies to proffer additional evidence on the remaining issues. After two days of evidentiary hearings, the court found that the burden of compliance by the companies would not be excessive (*id.* at 121-150). It therefore ordered the companies to comply with the FTC's orders, provided that the FTC give notice to any company requesting confidential treatment before publishing its individual company CPR data. The court of appeals affirmed (*id.* at 1-53).[6] We summarize in the pages that follow the pertinent portions of the court of appeals' opinion.

ARGUMENT

The petitions present no question warranting review by this Court. The court of appeals wrote a thorough opinion, on which we essentially rely. Moreover, several of the questions presented by the petitions are not properly before the Court or need not be reached.

1. Petitioners argue that the procedures established by the Administrative Procedure Act ("APA"), 5 U.S.C. 553, must be followed before the Commission may require corporations to submit information.

a. The district court held (Pet. App. 87-89, 91-92), and the court of appeals agreed (*id.* at 17 n. 46, 18 n. 48), that the Commission's requests for information do not fall within the definition of rulemaking contained in the APA, even if the APA were generally applicable to the issuance of requests for information. That decision, which involves only the application of settled principles to the facts of

[6]On September 28, 1978, the court of appeals postponed petitioners' obligation to file LB and CPR reports pending this Court's action on the petitions (Supplement to Petition in No. 78-167).

this case, is correct, and the case therefore does not require resolution of the broader issue whether the APA applies in the first place.

The district court concluded, and petitioners did not dispute in the court of appeals, that the Commission's orders were issued in aid of its law enforcement activities (Pet. App. 84-85). The surveys do not set rules or control the conduct of private parties in any way—other than to require answers to the questions. Because the surveys do not set law or establish agency enforcement policy, but simply seek basic data, they are not rules.[7]

b. The broad question of the application of the APA to requests for information is not presented for an additional reason: the FTC's procedures were sufficient even if the orders are treated as rules. The Commission published the 1974 LB survey proposal, invited comments, and held an oral hearing (see pages 4-6, *supra*). It solicited comments on many other occasions. It sought and received comments on the CPR form as well. The court of appeals remarked that the record "reflects an extensive consideration [by the FTC] of the problems posed by the development of these surveys" (Pet. App. 32 n. 91). The FTC has considered and reconsidered the comments and objections of hundreds of affected persons over many years, and there is no substance to petitioners' contention that the Commission did not do enough to solicit and consider their views.[8]

[7]For similar reasons, the LB survey does not prescribe accounting practices within the meaning of 5 U.S.C. 551(4). The Commission told the companies, and the district court agreed, that they need not change their accounting practices "or substantially rework data processing procedures" in order to complete the forms (Pet. App. 137, 140).

[8]Petitioners rely on the preliminary conclusion of the district court in *A.O. Smith, supra*, that the Commission had not adequately complied with the APA. But the district court's decision was reversed on appeal on other grounds, and, in any event, involved the 1973 LB forms, which had been developed using different administrative procedures. The Commission's procedures concerning the 1974 LB forms produced an ample administrative record, which was filed with and considered by the lower courts.

c. The decision of the court of appeals that the APA does not generally apply to requests for information and to the issuance of compulsory process is, in any event, correct.[9] It is consistent with many other decisions to the same effect. *Hannah* v. *Larche*, 363 U.S. 420, 445-453 (1960); *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 149 (1937); *United States* v. *W.H. Hodges & Co.*, 533 F. 2d 276, 278 (5th Cir. 1976); *Montship Lines, Ltd.* v. *FMB*, 295 F. 2d 147, 154 (D.C. Cir. 1961); *Walling* v. *News Printing Co.*, 148 F. 2d 57, 58 (3d Cir. 1945), aff'd, 327, U.S. 186 (1946).[10] As this Court recognized in *IT&T*

[9]See generally Pet. App. 14-21. As Representative Walter, the principal sponsor of the APA, observed, agency inquiries on questions of fact may be "entirely independent" of rulemaking or adjudication, and the statute "carefully distinguishes" inquiries from rulemaking and adjudication. 92 Cong. Rec. 5648 (1946).

[10]*NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), on which some petitioners rely (78-167 Pet. 24), is not to the contrary. The plurality held in that case only that the Board's conceded failure to comply with the APA's rulemaking requirements in deciding whether employers must provide a list of employees *to unions* did not invalidate a Board subpoena. No Justice stated that, as a general matter, the APA applies to requests by the Board that an employer furnish information to the Board for the Board's own use.

Union Oil Co. v. *FPC*, 542 F. 2d 1036 (9th Cir. 1976), on which petitioners also rely, is quite unlike the present case. As the court of appeals explained (Pet. App. 17 n. 46), a special statute required the FPC to conduct rulemaking proceedings before adopting a self-executing reporting requirement. The reporting requirements at issue here are not self-executing, and there is no special statute requiring the FTC to exercise its information-gathering powers through rulemaking.

v. *Electrical Workers,* 419 U.S. 428, 441-447 (1975), some types of agency activity are neither adjudication nor rulemaking for purposes of the APA, and the Act is not intended to apply to all conceivable forms of agency activity just because they may have an effect on future rulemaking or future adjudication. The APA has never been held to require that an agency follow rulemaking procedures in the issuance or enforcement of compulsory process. The companies involved in the surveys will be fully protected by the APA if the FTC's inquiries should ever lead to the promulgation of rules or to the commencement of actions against particular companies.

2. The CPR survey requires corporations to provide the Commission with information about the value of shipments in certain business categories that were formulated by the Census Bureau.[11] Because the FTC survey relies on the Census categories (so as to be compatible with aggregate data published by Census) rather than inventing new ones, the CPR survey question concerning value of shipments is substantially identical to a question that appears in the Census of Manufactures. Petitioners argue that this question in the CPR survey violates 13 U.S.C. 9, which precludes government agencies from requiring companies to produce "copies of census reports which have been retained" by them.

a. The language of the statute is quite plain. It forbids a request for "copies of census reports." The Commission has not requested any corporation to furnish a copy of a census report, and petitioners' argument that Section 9 means more than it says is unpersuasive.

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[11]The Census categories are based on the Standard Industrial Classifications developed for use throughout the government to promote uniformity and comparability in the collection and publication of data.

The legislative history indicates that Section 9 was directed precisely to requests for "copies" in the files of corporations. The statute was enacted in 1962, in response to this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), which held that the FTC could require corporations to furnish it with copies of census reports. The hearings and reports on the bill demonstrate that it was intended to nullify that part of *St. Regis* but to go no further; Congress considered and rejected a broader proposal that would have extended Section 9 beyond actual copies of census returns. This history is recounted at Pet. App. 27-30, and we do not repeat it here.

The purpose of confidentiality of census reports is to ensure that corporations can answer freely, without fear that their answers will be used against them; a requirement that a corporation surrender a file copy of a census report would jeopardize that assurance almost to the same extent as agency access to the answers in the hands of the Census Bureau. But the FTC question does not jeopardize that interest.[12] No one (other than the Census Bureau)

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[12]Petitioners seemingly contend that the Census Bureau supports their position that the Commission's survey is improper (78-167 Pet. 4, 8, 20). The impression is misleading. Although the comments of the Census Bureau concerning the FTC's survey were not uniformly complimentary, the Census Bureau has acknowledged before Congress that it "do[es] not question the right of FTC" to seek the information covered in the CPR survey (CPRA 633). The involved federal agencies thus are unanimous in supporting the statutory construction of the court of appeals cf. (CPRA 896). Moreover, although Congress has actively supervised the Commissions' informational programs, and has recently both enacted restrictions concerning the LB reports (Pub. L. No. 94-362, 90 Stat. 956) and amended the Census Act (Pub. L. No. 94-521, 90 Stat. 2460), it has never indicated disapproval of the Commission's attempt to obtain information on the same subjects that were the subject of prior census questions.

need ever know how any of petitioners answered the census question, or whether they gave identical answers to the Census Bureau and the FTC. Nothing underlying the idea of confidentiality of census answers makes the subject matter of the census questions forever off limits to other agencies; only the answers actually given to the Census Bureau are protected.[13] As the court of appeals recognized, the CPR survey does not "demand an answer identical" to the answer given to the census question (Pet. App. 28-29, quoting from H.R. Rep. No. 2437, 87th Cong., 2d Sess. 7 (1962)), and that is sufficient to dispose of petitioners' argument.[14]

3. Petitioners contend that, in upholding enforcement of the LB orders,[15] the court of appeals disregarded the

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[13]Petitioners conceded below that, consistently with Section 9, the Commission could properly inquire into the subject matter of value of shipments in specified markets or the facts or documents underlying a company's report to Census, and could ask the identical questions posed here if in aid of a particular or contemplated law enforcement proceeding (see, *e.g.*, Appellants' Joint Brief in the court of appeals, at 14, 32, 34, 36; Appellant's Joint Stay Motion in court of appeals, at 14). The evident contention that the same question is precluded when asked only generally in aid of law enforcement activities is without merit.

[14]The CPR orders and forms do not refer to the census reports, and the FTC does not seek the same answers. Some companies may not even have file copies of their census answers (CPRA 1037), and they would not know how they answered the earlier questions. Others may rely on more recent or more accurate data to give different responses to the FTC than they gave to the Census Bureau (Pet. App. 30). Still others may give different answers because the questions are different in some respects (Pet. App. 24 n. 63). And, as we point out in the text, the FTC need never learn whether it received the same answers that had been given to the Census Bureau.

[15]Although Deering-Milliken and perhaps the petitioners in No. 78-168 raise this question with respect to the CPR orders (78-169 Pet. 26-27; compare 78-168 Pet. 13 with *id.* at 31-32), they may not properly do so because none of the petitioners pressed this objection in the court of appeals (Pet. App. 35 n.100).

proper standard for reviewing the reasonableness of information demands enforced by compulsory process. The court erred, petitioners suggest (78-167 Pet. 26-30), by failing to weigh its own estimate of the probable value of the data sought against each company's likely cost of compliance with the orders.

The court of appeals' decision is consistent, however, with decisions of this Court and other courts of appeals in similar cases scrutinizing, as essentially independent factors, the relevance of the information sought to the purposes of the agency inquiry and the burden of compliance with the order or subpoena. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *United States* v. *Davey*, 543 F. 2d 996, 1000 (2d Cir. 1976); *FTC* v. *Gibson Prods. of San Antonio, Inc.*, 569 F. 2d 900, 906 (5th Cir. 1978); *FTC* v. *MacArthur*, 532 F. 2d 1135, 1141-1142 (7th Cir. 1976). See also *California Bankers Association* v. *Shultz*, 416 U.S. 21, 65-67 (1974). Certainly the Fourth Amendment does not require, as petitioners suggest, that a court substitute its own policy judgment for that of the agency in determining whether the likely outcome of an inquiry justifies the expense of compliance. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 216-217 (1946).[16]

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[16]Petitioners rely (78-167 Pet. 27-29) on such cases as *FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924), where the Court rejected "the Commission's claim of an unlimited right of access to the respondents' papers" (*Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 207 n. 40) without the need to show relevance to any purpose. But, as the Court clearly indicated in *Morton Salt*, such earlier decisions had improperly "engraft[ed] judicial limitations" upon administrative process (338 U.S. at 641-642). Even if *American Tobacco* is still authoritative, it does not assist petitioners because the court of appeals assessed the relevance of the information sought. Neither *Marshall* v. *Barlow's, Inc.*, No 76-1143 (May 23, 1978), nor *See* v. *City of Seattle*, 387 U.S. 541 (1967), both relied on by

On the record before it, the court of appeals correctly determined that the LB data were "reasonably relevant to the Commission's general purpose of collecting corporate financial information in order to assess industry-by-industry performance and market structure" (Pet. App. 36) and correctly affirmed the district court's finding that "the costs of compliance were *de minimis* relative to the overall corporate operating budgets" (Pet. App. 37, 143-144).[17] Given these findings, the FTC's orders would have been enforced even if the lower courts had applied the balancing test proposed by petitioners. Indeed, in ruling on an alternative contention of petitioners—that the court should apply an "arbitrary and capricious" test, which petitioners characterized as more stringent than the test of *Morton Salt*—both courts held that, even assuming this test to be appropriate, the Commission's orders were entitled to enforcement (Pet. App. 31-32 n. 91, 115 n. 59, 129-130).

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petitioners (78-167 Pet. 27-29), is to the contrary. In those cases the Court held that prior judicial sanction (albeit *ex parte*) is required for certain types of agency inspections of business premises. There has been ample prior judicial review here, and, what is more, there is no search or inspection.

[17]Petitioners err in asserting that the lower courts found that "the burden of compliance would run into hundreds of thousands of dollars annually for some respondents" (78-167 Pet. 28). In fact, the district court found that even for the first year (which reflects one-time start-up costs), petitioners' few estimates of compliance costs exceeding $100,000 were overstated, conclusory, and of doubtful credibility, and the evidence did not call into question the Commission's estimate that costs would average under $25,000 in the first year and, in subsequent years, substantially less (Pet. App. 138-147).

4. Nine petitioners seek review of the court of appeals' ruling in both the LB and CPR cases that the Commission may seek enforcement of its orders in a proceeding in the nature of mandamus (see 15 U.S.C. 49) by filing a "petition" and securing a show cause order from the court. They argue that the FTC must file a "complaint" and secure service of a summons issued by the clerk (78-168 Pet. 16-25; 78-169 Pet. 27-28). This is the first appellate decision on this narrow procedural question, and in the absence of a conflict among the circuits the issue does not require review by this Court.

The question presented arises only in the relatively few instances where, unlike the cases cited by petitioners (78-168 Pet. 19 n.16, 21-22 n.19), the Commission seeks an enforcement order under 15 U.S.C. 49 without also seeking civil penalties under 15 U.S.C. 50. As the court of appeals noted (Pet. App. 39-40), the practice followed by the Commission here, which parallels established practice for enforcement of subpoenas, has been uniformly sustained in the cases in which it has been challenged.[18] The differences in procedure are inconsequential, and they could not have prejudiced petitioners, who have received a full hearing on all of their arguments.[19] See also

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[18]Petitioners' assertion (78-168 Pet. 21-22) of a conflict with *Richardson* v. *United States*, 465 F. 2d 844 (3d Cir. 1972), rev'd on other grounds, 418 U.S. 166 (1974), is incorrect. The issue there was whether an action seeking mandamus against a government officer was in the nature of a request for an injunction so as to require a three-judge district court. In *United States* v. *St. Regis Paper Co.*, 285 F. 2d 607 (2d Cir. 1960), aff'd, 368 U.S. 208 (1961) (78-168 Pet. 21-22 n. 19), the court held only that an action seeking civil penalties under 15 U.S.C. 50, and mandamus under 15 U.S.C. 49, was not akin to a suit in equity within the meaning of the direct appeal provisions of the Expediting Act.

[19]Petitioners received more notice and time to respond than they would have received in an ordinary civil action, were able to produce

Schlesinger v. *Councilman*, 420 U.S. 738, 742 n. 5 (1975) (court may hear case even though not commenced by the filing of a complaint).

At all events, the question presented may become academic.[20] It need not be reached in this case, moreover, because all of the issues raised in the Commission's enforcement proceedings also were raised in pre-enforcement actions filed by petitioners and consolidated with the enforcement proceedings (Pet. App. 8-9 n. 3, 54). The decision here disposes of petitioners' suits as well as the Commission's enforcement proceedings; petitioners are bound by the former even if not by the latter.

5. Nine petitioners contend that the Comptroller General misapplied the Federal Reports Act of 1942,

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an extensive record, and were not deprived of any opportunity to present evidence. To the contrary, the district court resolved most of the issues on summary judgment motions, as in an ordinary civil action, and conducted a trial to resolve other issues (see pages 8-9, *supra*). Under the circumstances, petitioners' reliance on cases criticizing "summary" proceedings (78-168 Pet. 18) is plainly unwarranted.

[20] Both houses of Congress have passed a bill that would amend 15 U.S.C. 49 to provide for a unified procedure for enforcement of subpoenas and special report orders. See Section 6, H.R. 3816, 124 Cong. Rec. H9337 (daily ed. Sept. 8, 1978) (conference version). The report on that bill, citing with approval the district court's decision in these cases, states that "[t]he bill would carry forward existing law under which subpoenas and orders are enforced under [15 U.S.C. 49] in summary proceedings which are instituted by petition and show cause order." H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 27 n. 38 (1977). The conference report was approved by the Senate (124 Cong. Rec. S14918 (daily ed. Sept. 11, 1978)), but was not approved by the House because of a dispute on an unrelated issue. See 124 Cong. Rec. H11017-H11032 (daily ed. Sept. 28, 1978).

44 U.S.C. (Supp. V) 3512, in reviewing the 1974 LB report form (78-168 Pet. 25-29; 78-169 Pet. 28).[21] The Act provides that independent regulatory agencies must defer, for 45 days, sending certain types of questionnaires or other reporting requirements directed to 10 or more respondents, in order to afford the Comptroller an opportunity to review the form and advise the agency about specified matters. Petitioners contend that in conducting this review the Comptroller should have examined the probable utility, reliability, and meaningfulness of the data sought by the Commission's 1974 LB form. Petitioners base this claim on a provision in the Act stating that, "[w]hile the Comptroller General shall determine the availability from other Federal sources of the information sought and the appropriateness of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information." 44 U.S.C. (Supp. V) 3512(d).

The court of appeals carefully considered and properly rejected petitioners' arguments (Pet. App. 47-52). The language on which petitioners rely does not require the Comptroller General to duplicate all of the functions initially performed by the FTC. Section 3512(b) of the Act, which requires the Comptroller to review proposed forms "with a view toward (1) avoiding duplication of effort by independent regulatory agencies, and (2) minimizing the compliance burden on business enterprises

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[21] It is unclear whether petitioner Deering-Milliken seeks to raise this issue concerning review of the CPR forms, but it is precluded from doing so because only the application of the Act to the 1974 LB form was challenged on appeal (see Pet. App. 47 n.144).

and other persons," establishes the limited nature of the Comptroller's substantive task.[22]

Any other interpretation of the Federal Reports Act would give the Comptroller a power Congress desired to withhold. The 1973 amendments transferred the power to review the questionnaires of independent agencies from the Office of Management and Budget to the Comptroller principally in order to reduce the degree to which review of forms could be used to interfere with the independence of the agencies in question. Section 3512 requires the Comptroller to act within 45 days, and it does not expressly give the Comptroller any power to forbid use of any particular form. The Comptroller acts under Section 3512 to give advice to administrative agencies, and it is unlikely that Congress intended that advice to encompass the full range of issues that might be raised about the "appropriateness" of the information-gathering program itself, or about its costs and benefits. Surely such advice could not responsibly be rendered in all cases within the statutory limit of 45 days. Cf. *Flint Ridge Development Co.* v. *Scenic Rivers Association,* 426 U.S. 776, 790-791 (1976).

Moreover, because the Federal Reports Act does not explicitly authorize the Comptroller General to forbid the use of any particular form, it is an unresolved issue whether the further review that petitioners seek could

[22]The Comptroller has interpreted Section 3512(d) as conforming the agencies authority rather than as enlarging the scope of review established in Section 3512(b). The Comptroller has advised Congress of his interpretation of the statute and has asked Congress to consider repealing Section 3512, amending the statute in a way that would eliminate the provision on which petitioners rely, or transferring review authority back to the Office of Management and Budget. See General Accounting Office, *Status of GAO's Responsibilities Under the Federal Reports Act* (1976).

bind the Commission.[23] There would be little point, at this late date, in requiring the Comptroller to give a further opinion. Cf. *Immigration and Naturalization Service* v. *Bagamasbad,* 429 U.S. 24 (1976). There is a further question whether the Comptroller's reports are judicially reviewable (cf. *Morris* v. *Gressette,* 432 U.S. 491 (1977)), and whether it is appropriate to infer a private cause of action when the statute has provided none. The existence of these other barriers to relief reduces the practical consequences of petitioners' challenge to the Comptroller's action.

6. Petitioner Deering-Milliken, one of several privately held companies in the FTC's surveys, argues that its replies would disclose trade secrets that should not be made public. The succinct answer to this contention, given by the court of appeals (Pet. App. 44 n. 137), is that it is premature. The Commission has not yet proposed to release any confidential information.[24] The district court has ordered the Commission to notify companies that request confidential treatment before it publishes their

[23]The Commission and the Comptroller disagree on this point, but the court of appeals did not reach it there is no need to pursue it here.

[24]The Commission believes that it can make important use of the information even if it never releases any of it, not even aggregate data, to the public (see Pet. App. 41, 43, 108-109, 131 n. 7).

[25]The district court did not require the FTC to give prior notice before publishing aggregate LB reports, but Deering-Milliken has never requested notice concerning aggregate data from these reports. When several firms requested such notice concerning the 1973 data, the Commission agreed to provide it (LBA 2259).

individual CPR data;[25] if it ever should give such notice, petitioner Deering-Milliken could raise before the Commission any arguments it may have. See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 438 (1938).[26]

[26]Deering-Milliken argues (Pet. 22) that a later presentation of arguments would be futile in light of the Commission's denial of its motion to quash the LB orders. But Deering-Milliken sought complete exemption from the survey; the Commission's decision that Deering-Milliken must answer the question is quite distinct from a decision to make any particular use of the answers. The former decision, which the Commission has made, does not demonstrate that the Commission has prejudged the latter question (see Pet. App. 43-44 & n. 137). Because an adequate administrative remedy remains available, there is no conflict with the decision in *Genuine Parts Co.* v. *FTC*, 445 F. 2d 1382 (5th Cir. 1971).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

DOJ-1978-10